

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32563

STATE OF IDAHO,)	2008 Unpublished Opinion No. 633
)	
Plaintiff-Respondent,)	Filed: September 5, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
GARY DON WALTHALL,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Order denying motion to withdraw guilty plea, reversed and remanded.

Molly J. Huskey, State Appellate Public Defender; Erik D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant. Erik D. Fredericksen argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

PERRY, Judge

Gary Don Walthall appeals from his judgment of conviction for failure to register as a sex offender. Specifically, Walthall challenges the district court's denial of his motion to withdraw his guilty plea. For the reasons set forth below, we reverse and remand.

I.

FACTS AND PROCEDURE

On August 19, 2005, Walthall was stopped by a Boise police officer for failure to signal. A record check revealed that Walthall was a sex offender who had not registered in Idaho since 2003¹. Walthall's duty to register derived from a 1982 conviction for assault to commit rape in

¹ Although the parties and the district court discussed Walthall having last registered in Canyon County in 2001 during the change of plea hearing, the police report and the presentence investigation report indicate that Walthall last registered in Canyon County in 2003.

California. Walthall had also been convicted of failure to register as a sex offender in California in 2001.

Walthall was charged with violating I.C. § 18-8309 for failure to notify authorities of a change of address within five days. Walthall attempted to enter a guilty plea. However, because he would not admit certain elements of the offense, the district court allowed the state to amend the information to include an alternative charge of failure to register annually pursuant to I.C. § 18-8307. Walthall did not object to the amendment. Walthall then admitted he failed to register annually. The district court accepted Walthall's guilty plea and entered a judgment of conviction. Walthall appealed.

During the pendency of the appeal, Walthall filed a pro se motion to withdraw his guilty plea and requested a hearing and counsel. Walthall's direct appeal was suspended pending the outcome of his motion to withdraw his guilty plea. Counsel was appointed, and the district court held a hearing on Walthall's motion to withdraw his guilty plea. The district court denied Walthall's motion. The pending appeal was reinstated, and Walthall now challenges only the denial of his motion to withdraw his guilty plea.

II.

STANDARD OF REVIEW

Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* Also of importance is whether the motion to withdraw a plea is made before or after sentence is imposed. Idaho Criminal Rule 33(c) provides that a plea may be withdrawn after sentencing only to correct manifest injustice. The stricter standard after sentencing is justified to insure that the accused is not encouraged to plead guilty to test the weight of potential punishment and withdraw the plea if the sentence were unexpectedly severe. *Id.* Accordingly, in cases involving a motion to withdraw a plea after sentencing, appellate review is limited to reviewing the record and determining whether the trial court abused its sound discretion in determining that no manifest injustice would occur if the defendant was prohibited from withdrawing his or her plea. *State v. Lavy*, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992).

Manifest injustice will be found if the plea was not taken in compliance with constitutional due process standards, which require that a guilty plea be made voluntarily, knowingly, and intelligently. *State v. Shook*, 144 Idaho 858, 859, 172 P.3d 1133, 1134 (Ct. App. 2007); *State v. Huffman*, 137 Idaho 886, 887, 55 P.3d 879, 880 (Ct. App. 2002). Compliance with the constitutional due process standards requires: (1) the plea be voluntary in the sense that the defendant understood the nature of the charges and was not coerced; (2) the defendant knowingly and intelligently waived his rights to a jury trial, to confront adverse witnesses, and to avoid self-incrimination; and (3) the defendant understood the consequences of pleading guilty. *Huffman*, 137 Idaho at 887, 55 P.3d at 880.

In addition, the Idaho Supreme Court has held that a prima facie showing of compliance with due process requirements is made when the minimum requirements of I.C.R. 11(c) have been met. *Ray v. State*, 133 Idaho 96, 99, 982 P.2d 931, 934 (1999). Rule 11(c) provides:

Before a plea of guilty is accepted, the record of the entire proceedings, including reasonable inferences drawn therefrom, must show:

(1) The voluntariness of the plea.
(2) The defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other direct consequences which may apply.

....

(4) The defendant was informed of the nature of the charge against the defendant.

III. ANALYSIS

Walthall filed a motion to withdraw his guilty plea with the district court over fifteen months after entry of his judgment of conviction. On appeal, Walthall asserts various arguments to support his contention that the district court abused its discretion in determining that no manifest injustice would occur if he was prohibited from withdrawing his guilty plea.

A. Idaho Code Section 18-8309

Walthall asserts that he did not enter a plea of guilty to violating I.C. § 18-8309 nor did he enter an *Alford*² plea to that charge. Therefore, Walthall argues that the district court's factual finding that he pled guilty to I.C. § 18-8309 is unsupported by the record and clearly erroneous.

² See *North Carolina v. Alford*, 400 U.S. 25 (1970).

The state maintains that Walthall entered a plea of guilty to I.C. § 18-8307 and an *Alford* plea to I.C. § 18-8309.

This Court defers to the trial court's findings of fact unless they are clearly erroneous. *State v. Shafer*, 144 Idaho 370, 374, 161 P.3d 689, 693 (Ct. App. 2007). To be found clearly erroneous, factual findings must be unsupported by substantial and competent evidence. *State v. Henage*, 143 Idaho 655, 659, 152 P.3d 16, 20 (2007).

In support of his argument that he did not plead guilty to I.C. § 18-8309, Walthall relies on the change of plea hearing transcript. At Walthall's change of plea hearing, the following discussion occurred:

Q. Were you present in the state of Idaho, county of Ada on August 19th, 2005?

A. Yes, Your Honor.

Q. Did you at that time have a lawful duty to register as a sex offender?

A. Yes, Your Honor.

Q. Did you fail to provide written notice to the sheriff in the county where you are required to register?

A. Yes, Your Honor.

Q. That was of a new address within five days after you changed your address?

A. I admit I had been here a few hours.

THE COURT: [state's attorney], can you tell me the predicate facts upon which you base this case.

[STATE]: Your Honor, the handling attorney at the preliminary hearing indicated he was stopped for failure to signal. He did not have a valid driver's license. He had an expired Idaho ID from Idaho, Utah, Arizona. He was found to be required to register. He admitted he had not done his annual registration or registered when he moved. He admitted to living in Arizona and Utah. He said he was moving back to Idaho. Specifically he last registered in Canyon County in '01. He lived in Arizona, Utah, Nevada without registering. He had knowingly failed to register to an officer as he was required to do. So he said he had not just yet done it. And Canyon County was contacted and he was in fact a convicted sex offender that was required to register annually.

THE COURT: The first charge should have been failure to register annually?

[STATE]: I believe so.

THE COURT: Right now I'm not going to accept the guilty plea to the way it's pled at this point. Do you wish to amend your--the information, and [defense counsel], would you object if they amended it?

[DEFENSE COUNSEL]: No, Judge. I would not.

[STATE]: It appears as though from the facts that he related to the officer, that it would be appropriate to amend the charge indicating

that he had failed to register on an annual basis. He told the officer that he failed to register for four years. So we would move to amend the language to indicate having a lawful duty to register as a sex offender, failed to register on an annual basis.

THE COURT: All right. Is there any objection to doing that?

[DEFENSE COUNSEL]: No, Judge. Judge, there is some conflict in regard to this information. From what I have been able to determine, there was some sort of admission by my client to the officer of having been in the area for approximately ten days and he indicated here that he had only been here a few hours. So there certainly is some information in the police reports that would potentially justify the information the way it was originally, but based on what we have been presented with today, it is certainly appropriate to amend it at this time.

THE COURT: Why don't we do this, why don't you amend it in the alternative and say in the alternative failure to register annually as required. Is there any objection to amending it in that way?

[DEFENSE COUNSEL]: No, Judge.

THE COURT: Then given that, Mr. Walthall, do you admit that you failed to register annually as required by statute?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. You are not admitting that you failed to do it within five days; is that correct?

THE DEFENDANT: That's correct.

THE COURT: You are admitting to having failed to register annually as required by state statute?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is there anything else that you would disagree with in the information?

THE DEFENDANT: No, Your Honor, except I was up here basically for a visit. I live in Utah.

THE COURT: You're still required to register annually?

THE DEFENDANT: Yes, Your Honor, and I did not do that in Utah.

THE COURT: Based on what you told me, I'm going to-- I'm going to ask you how do you plead to this information?

THE DEFENDANT: I plead guilty.

THE COURT: All right. Do you believe it is in your best interest to plead guilty in this case?

THE DEFENDANT: Yes, I do.

THE COURT: To the extent that someone would call this an Alford plea, in other words, to the extent that you are not fully admitting to the allegation in the information, do you believe that there's a strong likelihood that if the State would present the evidence that it has based on your admission to the officer to a jury, that the jury would likely find you guilty of *this crime*?

THE DEFENDANT: Yes, Your Honor, they probably would.

THE COURT: Do you believe it is in your best interest given the offer that the State has made to [plead] guilty at this time?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You are doing so in order to take advantage of a good agreement?

THE DEFENDANT: Yes, Your Honor. I think it's a good agreement for me.

THE COURT: Then based on what you've told me, I'm going to accept your plea as having been knowingly and voluntarily given. I'll direct my clerk to enter your plea on the record. Based on that, I'm going to find that you are guilty of *this crime* and order that a judgment of conviction be recorded.

(Emphasis added).

Based on the exchange between the district court and Walthall, he argues that at no point, after initially rejecting his plea to I.C. § 18-8309, did the district court indicate it was accepting his *Alford* plea to that charge or that it was accepting his previous attempt to plead guilty to that charge. Walthall also focuses on two instances where the district court referred to Walthall's plea of guilty to "this crime." The district court's reference to "this crime" indicates that, contrary to the state's assertion that Walthall pled to both charges, Walthall only pled guilty to one charge.³

After briefing and argument on Walthall's motion to withdraw his guilty plea, the district court concluded that "during [the above] colloquy, the Court is clearly referring to the allegation that [Walthall] failed to register within five days, because he had already testified he failed to annually register." Although it may have become clear to the district court in hindsight that the court's intent was to accept an *Alford* plea concerning the charge of failure to notify of a change of address within five days, it is the defendant who must enter a voluntary, knowing, and intelligent plea. From the colloquy, it is not at all clear that Walthall intended to enter either a guilty plea or an *Alford* plea to that charge. Walthall did not request to enter an *Alford* plea. It was the district court that first introduced the possibility of an *Alford* plea and it appears that the concept of such a plea, let alone what charge Walthall was entering an *Alford* plea to, was not explained to him. Walthall continually denied violating I.C. § 18-8309 and even asserted that he

³ It appears as though the parties and the district court may have mistakenly believed that both failure to notify of a change of address and failure to register annually were contained within the same section of the Idaho Code.

was only visiting Idaho and still lived in Utah. Therefore, we cannot conclude that he pled guilty to that charge, let alone that any such plea was knowing or voluntary.

At oral argument before this Court, the state conceded that both parties “rather aggressively pursued making sure that [the plea] got done in court,” and that both parties “bent the rules” in order to make sure the plea went forward. Based on a review of the change of plea hearing transcript, we cannot conclude that the district court’s finding that Walthall entered a guilty plea to violating I.C. § 18-8309 is supported by substantial and competent evidence.

B. Idaho Code Section 18-8307

Walthall also argues that he did not enter a voluntary, knowing, and intelligent plea to violating I.C. § 18-8307. We agree.

A voluntary guilty plea requires that the defendant understand the nature of the charges to which he is pleading guilty. *Boykin v. Alabama*, 395 U.S. 238, 244 n.7 (1969); *State v. Arthur*, 145 Idaho 219, 222, 177 P.3d 966, 969 (2008). Additionally, compliance with I.C.R. 11 requires that the defendant be informed of the consequences of the plea, including minimum and maximum punishments. In *Arthur*, the defendant argued that the district court abused its discretion by denying his motion to withdraw his guilty plea to being a persistent violator on the basis that he did not understand the nature of the charge and what he was pleading guilty to. The Idaho Supreme Court noted that the record indicated that Arthur, his counsel, counsel for the State, and the district court had a lengthy discussion regarding the persistent violator portion of the plea just prior to the scheduled jury trial. *Arthur*, 145 Idaho at 222, 177 P.3d at 969. Furthermore, the Court noted that the record indicated that these parties also discussed Arthur’s potential sentence. Therefore, the Court concluded that Arthur was fully informed of what he was pleading guilty to and the consequences of that plea and it affirmed the district court’s denial of Arthur’s motion to withdraw his guilty plea.

In this case, the version of I.C. § 18-8307, titled “Initial registration,” in place in 2005 provided, in pertinent part:

(4)(a) Within ten (10) days of coming into any county to establish permanent or temporary residence, an offender shall register with the sheriff of the county. The offender thereafter shall update the registration annually. If the offender intends to reside in another state, the offender shall register in the other state within ten (10) days of moving to that state.

....

(5) Annual registration shall be conducted as follows:

(a) On or about the first day of the month containing the anniversary date of the last registration which required fingerprints and a photograph, the department shall mail a nonforwardable notice of annual registration to the offender's last reported address;

(b) Within ten (10) days of the mailing date of the notice, the offender shall appear in person at the office of the sheriff with jurisdiction for the purpose of completing the registration process;

Idaho Criminal Jury Instruction 985A outlines the elements that the state would be required to show in order to prove a violation of I.C. § 18-8307. That instruction provides, in pertinent part:

In order for the defendant to be guilty of Failing to Register Annually as a Sex Offender, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] failed to register
4. with the sheriff of the county in which the defendant resided or was temporarily domiciled
5. within ten (10) days after the Idaho State Police mailed a notice of annual registration to the defendant at [his] [her] last reported address, and
6. the defendant was at that time required to register under the Sex Offender Registration Act.

The amended information in Walthall's case alleged, in pertinent part:

GARY DON WALTHALL is/are accused by this Information of the crime(s) of: FAILURE TO REGISTER AS A SEX OFFENDER, FELONY, I.C. § 18-8309 which crime(s) was/were committed as follows:

That the Defendant, GARY DON WALTHALL, on or about the 19th day of August, 2005, in the County of Ada, State of Idaho, did, while having the lawful duty to register as a sex offender, failed to provide written notice to the sheriff of the county where the offender is required to register, of a new address within five (5) days after he/she has changed his/her address or actual residence *or in the alternative failed to register annually as required.*

(Emphasis added). The italicized portion of the information was added by the district court's handwritten interlineation during Walthall's change of plea hearing. The only specificity offered in the amended information regarding the new allegation of violating I.C. § 18-8307 is that Walthall "failed to register annually as required."

The change of plea hearing transcript demonstrates that the only discussion about the nature of this new charge was that Walthall had a duty to register annually "as required" and that he failed to do so. There was no discussion of the fifth element from I.C.J.I. 985A-- the mailing

of the notification by the Idaho State Police or the timeframe in which Walthall would have to respond. Moreover, Walthall's admission to this offense was that he did not register annually "in Utah," thus evidencing a lack of understanding of the elements of this offense. Unlike the situation in *Arthur*, in this case the cursory discussion about the nature of the new charge was insufficient to comply with I.C.R. 11 or the due process standard of a voluntary, knowing, and intelligent plea. Additionally, although the record reveals that Walthall was informed of the maximum potential penalty for a violation of I.C. § 18-8309, no discussion of the maximum potential penalty for violating I.C. § 18-8307 took place after this allegation was added to the information.⁴

The record reveals that there was no compliance with I.C.R. 11 and the requirement of informing a defendant of the maximum potential penalty. Additionally, because the nature of the new charge added with the information's amendment was not discussed with Walthall, we cannot conclude his plea to violating I.C. § 18-8307 was voluntary, knowing, or intelligent.

IV. CONCLUSION

Given the confusion evidenced in the change of plea hearing transcript, we conclude that the district court's determination that Walthall entered a plea to a violation of I.C. § 18-8309 is clearly erroneous. We also conclude that Walthall did not enter a voluntary, knowing, and intelligent plea to a violation of I.C. § 18-8307. Accordingly, we hold that the district court abused its discretion in determining that no manifest injustice would occur if Walthall was prohibited from withdrawing his guilty plea.⁵ Therefore, the district court's order denying Walthall's motion to withdraw his guilty plea is reversed, and this case is remanded for further proceedings.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**

⁴ Although we realize that the penalties for violating both code sections are the same, there is no indication in the record that Walthall realized the two allegations were from different code sections or that the penalties were the same but would be imposed consecutively.

⁵ Based on this conclusion, we decline to address Walthall's additional arguments regarding the withdrawal of his guilty plea.